STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
BONNIE I. UPCHURCH,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2006CA2841
	)	EEOC NO(S): N/A
and	)	ALS NO(S): 07-298
	)	
UNIVERSITY OF CHICAGO,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION)

Entered this 9th day of April 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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BONNIE I. UPCHURCH,	) **Charge No: 2006CA2841**
	) **EEOC No: N/A**
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UNIVERSITY OF CHICAGO,	)
	)
Respondent.	)

RECOMMENDED ORDER AND DECISION

This matter is before me on Respondent's motion for summary decision and Complainant's cross motion for summary decision. Respondent filed its motion, along with exhibits and affidavits, on January 18, 2008. Complainant filed a brief entitled *Response* on February 29, 2008, and also filed what appears to be an identical brief on March 14, 2008. Also, on March 14, 2008, Complainant filed a brief along with exhibits, which purports to be Complainant's cross motion for summary decision. Respondent filed *Respondent's Combined Reply in Support of its Motion for Summary Decision and Response to Complainant's Motion for Summary Decision* on March 25, 2008. Complainant filed *Complainant's Reply to the Respondent's Response for a Summary Decision* on April 2, 2008. Respondent filed a sur-reply in support of its motion on April 18, 2008. Complainant filed a response to Respondent's sur-reply on May 21, 2008.

CONTENTIONS OF THE PARTIES

Respondent contends that summary decision must be granted because the undisputed facts support that Complainant cannot establish a *prima facie* case of harassment or discrimination based on age or disability. Complainant opposes the motion.

FINDINGS OF FACT

The following facts were derived from uncontested facts in the record and were not the result of credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Respondent is the largest non-profit publisher of scholarly books and journals in the U.S., publishing approximately 250 new book titles and 42 different scholarly journals annually.

2. Complainant was hired as a Customer Service Representative (CSR) for Respondent in December, 1994. At the time of the alleged discriminatory acts, Complainant was 56 years old and worked at the Chicago Distribution Center of the University of Chicago Press (Chicago Press). Complainant's job duties included processing customer orders for books and other publications and ensuring that the correct items in the right quantities were shipped and billed to the correct customers.

3. At all relevant times, Complainant suffered from right knee pain disorder and hypertension.

4. Donald Collins was the President of the Chicago Distribution Center of the University of Chicago Press in 2004. Collins supervised Respondent's Customer Service Managers, Karen Hyzy and Latrice Allen. Collins met with Hyzy and Allen in August, 2004 and instructed them to announce and implement an improved error-control policy for the purpose of limiting careless, costly mistakes of items being billed or shipped to the wrong customers. The new error-control policy required Hyzy and Allen to begin systematically tracking CSR errors and to begin to impose progressive discipline according to the new policy.

5. The new error-control policy operated on a progressive discipline basis, in that punishments would increase in severity as mistakes continued to be made. The disciplinary progression required CSR's to be subject to a verbal warning, a written warning, a one-day suspension, a three-day suspension and a five-day suspension prior to discharge.

6. In August, 2004, Hyzy and Allen met with all of the CSR's, including Complainant, and informed them of the new error-control policy. The CSR's were further informed that their past errors would be wiped-clean and the new system of tracking errors would begin anew with the new progressive discipline policy.

7. Beginning August, 2004, disciplinary action was issued to Complainant as follows: verbal warning for unsatisfactory job performance on Sept. 9, 2004; written warning for unsatisfactory job performance on December 17, 2004; suspension for 3.5 days for poor job performance on December 17, 2004 (this suspension was due to a particularly egregious error in which Complainant billed the customer for 663 books at a cost of $9,172.70 instead of the correct amount of 5 books at a cost of $103.50 - this suspension was not considered in the implementation of the new disciplinary policy); one-day suspension for unsatisfactory job performance on June 9, 2005; 3-day suspension for unsatisfactory job performance on Sept. 29, 2005; 5-day suspension for unsatisfactory performance on Jan. 3, 2006, and discharge for unsatisfactory job performance on March 31, 2006.

8. From August, 2004 until March, 2006, seven CSRs, including Complainant, worked for Respondent. The names of five of the other CSRs were Marie Slivka, Marilou Johnston, Danielle Stampley, Renee Marlowe and Tina Bubala.

9. During the time period from August, 2004 until March, 2006, Marie Slivka received a verbal warning, a written warning and a one-day suspension; Marilou Johnston received two verbal warnings; and Danielle Stampley received a warning and a 3-day suspension (this suspension was due to a particularly egregious error in which Stampley overcharged a customer by $2,000.00).

10. Complainant's attachment #2 to her motion is a document Complainant compiled from her own notes while working for Respondent in which she tracked her coworkers' errors from October, 2005 until March, 2006. This document tracked errors made by Slivka, Johnston, Stampley, Marlowe and Bubala. The document shows Slivka as having made 7 errors; Johnston as having made 23 errors; Marlowe as having made 12 errors; Bubala as having made 11 errors; and Stampley as having made 19 errors.

11. During the time period from August, 2004 through March, 2006, Complainant made 51 errors.

12. During the time period from August, 2004 through March, 2006, Respondent tracked Slivka as having made 16 errors; Johnston as having made 7 errors; and Stampley as having made 8 errors; no other CSR's made any errors.

13. Complainant's co-workers, Slivka, Johnston, Stampley, Marlowe and Bubala all made substantially fewer errors than Complainant for the period August, 2004 until March, 2006.

CONCLUSIONS OF LAW

1. The Illinois Human Rights Commission has jurisdiction over the parties and subject matter of this Complaint.

2. Respondent is an employer as defined by section 5/2-101(B)(1) and Complainant is an aggrieved party as defined by section 5/1-103(B) of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*
3. This record presents no genuine issues of fact as to Complainant's allegations of harassment due to age and disabilities; as to Complainant's allegations of unequal treatment due to age and disabilities; as to Complainant's allegations of suspension due to age and disabilities; or as to Complainant's allegations of discharge due to age and disabilities.
4. Respondent is entitled to summary decision as a matter of law.

DETERMINATION

This record presents no genuine issues of material fact as to any of the claims alleged in this matter; therefore, Respondent is entitled to summary decision in its favor.

DISCUSSION

This matter is being considered pursuant to Respondent's motion for summary decision. A summary decision is analogous to a summary judgment in the Circuit Court. *Cano v Village of Dolton*, 250 Ill App 3d 130, 620 NE2d 1200 (1st Dist 1993). A motion for summary decision is to be granted when the pleadings, depositions, exhibits and affidavits on file reveal that no genuine issue of material fact exists and establish that the moving party is entitled to judgment as a matter of law. See, Section 5/8-106.1 of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*, and *Young v Lemons*, 266 Ill App 3d 49, 51, 203 Ill Dec 290, 639 NE2d 610 (1st Dist 1994). In determining whether a genuine issue of material fact exists, the record is construed in the light most favorable to the non-moving party, and strictly against the moving party. *Gatlin v Ruder*, 137 Ill 2d 284, 293, 148 Ill Dec 188, 560 NE2d 586 (1990); *Soderlund Brothers, Inc., v Carrier Corp.*, 278 Ill App 3d 606, 614, 215 Ill Dec 251, 663 NE 2d 1 (1st Dist 1995). A summary

order is a drastic method of disposing of a case and should be granted only if the right of the moving party is clear and free from doubt. *Loyola Academy v S&S Roof Maintenance, Inc.*,146 Ill 2d 263, 271, 166 Ill Dec 882, 586 NE2d 1211 (1992); *McCullough v Gallaher & Speck*, 254 Ill App 3d 941, 948, 194 Ill Dec 86, 627 NE2d 202 (1st Dist 1993).

Although Complainant is not required to prove her case to defeat the motion, she is required to present some factual basis that would arguably entitle her to a judgment under the law. *Birck v City of Quincy*, 241 Ill App 3d 119, 608 NE2d 920, 181 Ill Dec 669 (4th Dist 1993) citing, *inter alia*, *West v Deere & Co.*, 145 Ill 2d 177, 182, 164 Ill Dec 122, 124, 582 NE2d 685, 687 (1991).

A Complainant bears the burden of proving discrimination by the preponderance of the evidence. Section 5/8A -102 (I) (1) of the Act. That burden may be satisfied by direct evidence that adverse action was taken for impermissible reasons or through indirect evidence in accordance with the method set out in *McDonnell Douglas Corp. v Green*, 411 US 793, 93 S Ct 1817 (1973), and *Texas Dept. of Community Affairs v Burdine,* 450 US 248, 101 S Ct 1089 (1981). This method of proof has been approved by the Illinois Supreme Court and adopted by the Commission in *Zaderaka v Illinois Human Rights Commission*,131 Ill 2d 172, 545 NE2d 684 (1989).

Under this three-step approach, a complainant must first establish a *prima facie* case of unlawful discrimination. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action. Once the respondent successfully makes this articulation, the presumption of unlawful discrimination drops and the complainant is required to prove, by a preponderance of the evidence, that the respondent's articulated reason is a pretext for unlawful discrimination.

Respondent hired Complainant in December, 1994 as a customer service representative (CSR) at Respondent's Chicago Distribution Center of the University of

Chicago Press (Chicago Press). The Chicago Press is the largest non-profit publisher of scholarly books and journals in the United States, publishing approximately 250 new book titles and 42 scholarly journals annually. The Chicago Press stocks approximately 34,000 active book and journal titles and ships approximately five million units annually. As a CSR, Complainant was responsible for processing customer orders for books and other publications and ensuring the correct items in the correct quantities were shipped and billed to the correct customers. At the time of the alleged discriminatory acts, Complainant was 56 years old, worked at the Chicago Press, and suffered from right knee pain disorder and hypertension.

Donald Collins was the President of the Chicago Press in 2004. Collins supervised Respondent's Customer Service Managers, Karen Hyzy and Latrice Allen. Collins met with Hyzy and Allen in August, 2004, and instructed them to announce and implement an improved error-control policy for the purpose of limiting careless, costly mistakes of items being billed or shipped to the wrong customers. The new error-control policy required Hyzy and Allen to begin systematically tracking CSR errors and to begin to impose progressive discipline on CSRs according to Chicago Press policy. The new error-control policy operated on a progressive discipline basis, in that punishment would increase in severity as mistakes continued to be made. The disciplinary progression required CSR's to be subject to a verbal warning, a written warning, a one-day suspension, a three-day suspension and a five-day suspension prior to discharge.

In August, 2004, Hyzy and Allen met with all of the CSR's, including Complainant, and informed them of the new error-control policy. The CSR's were further informed that their past errors would be wiped-clean and the new system of tracking errors would begin anew with the new progressive discipline policy in August, 2004.

Complainant's twelve-count complaint alleges that Respondent subjected her to harassment and to discrimination based on age and physical disabilities. Complainant's allegations do not present facts to establish a direct case of discrimination. Proving discrimination by direct evidence entails providing evidence which, "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Randle v LaSalle Telecommunication*, Inc. 876 F2d 563, 569 (7th Cir 1989). In the employment discrimination context, direct evidence relates to what an employer did and/or said regarding a particular employment decision. Where there is direct evidence of discrimination, it is unnecessary to use the indirect method as set out in the *Burdine* analysis. *Gregan and Rock Island Housing Authority*, IHRC, 3756, June 29, 1992. Here, Complainant's claims are analyzed pursuant to the indirect method.

Harassment based on age and physical disabilities

In Counts I, II and III, Complainant alleges that she was subjected to harassment based on her age, 56 years old, and on her physical disabilities – right knee disorder and hypertension. Complainant alleges that the harassment consisted of conduct directed toward her by Customer Service Manager, Karen Hyzy. Complainant alleges that Hyzy talked to her in a rude and demeaning manner in front of other employees, raised her voice at Complainant, and snapped at Complainant when Complainant asked her questions. Complainant further alleges that Hyzy allowed a co-worker to harass her by allowing the co-worker to continually swear and speak loudly while Complainant was trying to perform her job duties while speaking on the telephone.

Although Respondent contends Complainant's right knee disorder and hypertension do not qualify as disabilities within the definition of the Act at Section 5/1-103(I), there are clearly issues of fact as to whether these conditions fall within the legal definition of disability. Therefore, this issue is resolved in the light most favorable to Complainant in accordance with summary decision standards.

Respondent next argues that Complainant's allegations do not rise to the level of actionable harassment as a matter of law because the stated allegations are not sufficiently severe or pervasive enough so as to alter the conditions of complainant's employment and create a hostile or abusive atmosphere.

To prove her claims on the harassment issue, Complainant must prove that she was harassed on the bases of her age and disabilities and that the harassment was so severe or pervasive that it altered the conditions of her employment and created an abusive work environment. *Hu and Allstate Insurance, IHRC, 6082*, June 16, 1995.

Complainant's responses in the motion essentially restate the allegations in her complaint that Hyzy spoke to her in a rude manner and snapped at her; that Hyzy allowed a co-worker, Rene Marlowe, to swear and be loud while Complainant was performing her work by talking on the telephone, conduct which, Complainant says, created a distracting and offensive environment; and that Respondent took no action to remedy the situation.

Complainant's vague allegations and failure to specifically describe the alleged harassing language to which she was subjected dooms her claims. Complainant's claims of being spoken to in a rude manner and snapped at by her supervisor are not the kind of claims said to be sufficiently severe or pervasive to create a hostile environment. In *Cunningham and Wal-Mart Stores, IHRC, 9048, April 16, 1998,* complainant alleged that she experienced harassment when a co-worker used foul language in the workplace. The Commission stated that complainant failed to provide sufficient information regarding the use of the profane comments in order to establish whether the language rose to the level of harassment. Similarly, in *Saxton v American Telephone & Telegraph Co.*,10 F3d 526 (7th Cir 1993), the employee claimed a supervisor harassed her by not speaking to her, acting in a condescending manner, and teasing her about her personal relationship with another employee. In affirming the

district court's ruling granting summary decision in favor of the employer, the appellate court stated that, while such behavior may make work life unpleasant, conduct that is merely offensive is inadequate to establish a hostile work environment.

Furthermore, Complainant here fails to present any evidence to tie any of the objectionable comments by Hyzy or Marlowe to her age or disabilities. In a ruling on *request for review* regarding a gender harassment claim in *Cunningham v Walmart Stores, Inc.*, (1990SF0335), September 13, 1993, the Commission found no harassment present when a store manager called the complainant names such as "stupid" and "porky pig," slammed doors in her face, and was rude to her. The Commission held that these actions did not amount to an actionable claim of harassment because the complainant failed to demonstrate how such actions were motivated by her gender.

Further undermining her claim here is Complainant's failure to address how Marlowe's actions affected her more than they affected anyone else in the workplace. To the contrary, Complainant presents facts which strongly suggest otherwise. Complainant identifies other co-workers she says could attest to Marlowe's disruptive behavior. This statement by Complainant strongly implies that this alleged disruptive behavior was not specifically directed at Complainant as other employees were subjected to Marlowe's loud and profane conduct.

This record presents no disputed facts as to whether the alleged conduct was sufficiently severe or pervasive enough to rise to the level of actionable harassment or as to whether complainant was subjected to any such conduct based on her age or disabilities. Thus, Complainant's *prima facie* cases here fail and Respondent is entitled to summary decision on these claims.

Unequal terms and conditions of employment (supervisor checked her work more often) due to age and physical disabilities

Complainant's Counts IV, V and VI allege that, from October 26, 2005 through March 31, 2006, she was subjected to unequal terms and conditions of employment due to her age and physical disabilities – right knee disorder and hypertension. Complainant alleges that Latrice Allen, Assistant Customer Service Manager, inspected her work for errors and that younger employees only had their work inspected randomly and not as often as she.

In order to prove a *prima facie* case of unequal terms and conditions of employment based on age and/or disabilities, Complainant must show that: (1) she is a member of one or more protected classes; (2) she was performing her job according to Respondent's legitimate expectations; (3) she suffered an adverse employment action; and (4) other individuals not within her protected classes were treated more favorably. *Muhammad and Walsh/Traylor/McHugh*, IHRC, 9466, March 13, 2002.

Complainant can prove the first element of her *prima facie* case in that she can show she is a member of the protected class of persons over 40 years of age and that she suffered from disabilities stemming from a right knee disorder and hypertension. However, Complainant's presentation fails miserably on the other three elements of her *prima facie* case.

Complainant maintains that she was subjected to an adverse employment action when Allen inspected her work more harshly than she inspected the work of younger employees, Marie Slivka, Marilou Johnston, Danielle Stampley, Rene Marlowe, and Tina Bubala. However, Complainant presents absolutely no evidence to support this allegation. There is nothing in the record showing how often Respondent checked Complainant's work or how often Respondent checked any of the other named

employees' work. Moreover, other than her unsupported assertion that her performance was satisfactory, Complainant puts forth no facts to demonstrate that she was performing up to Respondent's legitimate standards.

Respondent, on the other hand, presents competent admissible evidence in its motion showing that Complainant was not performing to expectations. Respondent provides copies of notices of corrective action issued to Complainant as follows: verbal warning for unsatisfactory job performance on Sept. 9, 2004; written warning for unsatisfactory job performance on December 17, 2004; suspension for 3.5 days for poor job performance on December 17, 2004 (this suspension was due to a particularly egregious error in which Complainant billed the customer for 663 books at a cost of $9,172.70 instead of the correct amount of 5 books at a cost of $103.50; this suspension was not considered in the implementation of the new disciplinary policy); one-day suspension for unsatisfactory job performance on June 9, 2005; 3-day suspension for unsatisfactory job performance on Sept. 29, 2005; 5-day suspension for unsatisfactory performance on Jan. 3, 2006, and discharge for unsatisfactory job performance on March 31, 2006.

Respondent further presents an affidavit from Allen averring that Complainant made 51 billing and shipping errors from August, 2004 through March, 2006, which she says totaled more errors than those made by all of the remaining CSR employees combined. Allen further avers that the only CSR's who made billing or shipping errors during that same period were Marie Slivka, who made 16; Marilou Johnston, who made 7; and Danielle Stampley, who made 8.

Complainant attempts to refute Allen's averment by submitting a document (Complainant's attachment #2 to her motion) she says she compiled from her own notes while working for Respondent, in which she tracked her coworkers' errors from October, 2005 until March, 2006. This document purports to track errors made by Slivka,

Johnston, Stampley, Marlowe and Bubala. The document does nothing to refute Respondent's averments as the errors tracked by Complainant were for a time period consisting of 14 months less than that tracked by Respondent. Further, Complainant's document shows Slivka as having made 7 errors; Johnston as having made 23 errors; Marlowe as having made 12 errors; Bubala as having made 11 errors; and Stampley as having made 19 errors. These error figures are far less than those attributable to Complainant by Respondent. Complainant's document fails to address Allen's averment that Complainant made 51 errors during the period between August, 2004 and March, 2006, and further fails to dispute the disciplinary action Respondent meted out to Complainant during the August, 2004 until March, 2006 period. Because Complainant fails to provide evidence to refute Respondent's submissions, those submissions stand unrebutted and must be accepted as true. *Koukoulomatis v. Disco Wheels,* 127 Ill App 3d 95, 468 NE2d 477 (1st Dist 1984).

Taking this evidence in the light most favorable to Complainant, there remain no issues of fact as to the second, third and fourth elements of Complainant's *prima facie* cases and Complainant's claims here fail. Respondent is entitled to summary decision on the claims of unequal terms and conditions of employment due to age and physical disabilities based on Complainant's claim that her supervisor checked her work more often.

Unequal terms and conditions of employment in form of suspension based on age and physical disabilities

Complainant's Counts VII, VIII and IX allege that she was suspended on January 4, 2006, based on her age and on her physical disabilities – right knee disorder and hypertension. Complainant alleges that younger employees who had similar performance levels were not suspended and that non-physically disabled employees who had similar performance levels were not suspended.

In order to prove a *prima facie* case of age and physical disability discrimination as to these three counts, Complainant must show that: (1) she is a member of the protected classes; (2) she was performing her job according to Respondent's legitimate expectations; (3) she suffered an adverse employment action; and (4) other individuals not within her protected classes were treated more favorably. *Hill v American National Can Co.*, IHRC, 9644, Nov. 30, 1999.

Similar to the previous analyses as to the claims of unequal terms and conditions of employment due to age and physical handicaps, Complainant's *prima facie* cases here also fail. Here, Complainant can prove the first element in that she can establish she is a member of the protected classes. The third element is not disputed, as the parties agree that Complainant suffered an adverse employment action when she was suspended on January 4, 2006. However, as previously discussed, Complainant cannot prove the second element of her *prima facie* showing in light of Respondent's documentation of Complainant's poor work performance record, which remains undisputed.

Complainant also cannot establish the forth element. Although Complainant points to Marie Slivka, Marilou Johnston, Danielle Stampley, Renee Marlowe, and Tina Bubala as younger employees, and presumably as non-handicapped employees, as was previously analyzed, Slivka, Johnston, Stampley, Marlowe and Bubala had performance records that were markedly superior to that of Complainant's. Thus, these employees are not similarly situated for this comparison and Complainant's *prima facie* showings based on age and disability discrimination fail. See, *Loyola v. University of Chicago v Illinois Human Rights Commission,* 149 Ill App 3d 8, 500 NE2d 639, 102 Ill Dec. 746 (1st Dist.1986).

Unequal terms and conditions of employment in form of discharge based on age and physical disabilities

Finally, Complainant's Counts X, XI, and XII allege that she was discharged on March 31, 2006, based on her age and physical handicaps – right knee disorder and hypertension – and that other co-workers not in her protected classes had similar performance records and were not discharged. Complainant again references the co-workers in her attachment #2 as comparables. As previously discussed, Complainant fails to make any evidentiary showing that she was performing within her employer's expectations or that the named comparables not in her protected classes were performing similarly. For these reasons, Complainant's *prima facie* showing as to discharge based on her age and physical disabilities fails.

RECOMMENDATION

Based on the foregoing, this record presents no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that Complainant's motion for summary decision be denied and that Respondent's motion for summary decision be granted and that the complaint in this matter be dismissed in its entirety with prejudice.

HUMAN RIGHTS COMMISSION

August 6, 2009

SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section